Supreme Court, U.S.
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No. 96-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

DONNIE GLOVER and
BECKY AHLERS - - - - - - *Petitioners*

versus

RUSSELL DURHAM - - - - *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPELAS FOR THE SIXTH CIRCUIT

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57 pp

QUESTIONS PRESENTED

1. Whether the objective reasonable test for qualified immunity long articulated by this Court in actions for money damages under 42 U.S.C. § 1983 is to be abandoned and replaced by a new, novel test established by the United States Court of Appeals for the Sixth Circuit in this case without reference to any precedent of this Court or any other Circuit, whereby the issue of whether a particular right was or was not clearly established at the time of a defendant's alleged conduct is no longer to be answered in the affirmative only where relevant preexisting decisions unmistakably point to the unconstitutionality of the defendant's alleged conduct, but may now be answered in the affirmative, thereby denying the defendant qualified immunity, based solely on one (1) recently published decision of first impression of that Court of Appeals, wherein the facts are so unrelated to those at hand that any analogy between the situation of the defendant then and that of the defendant now is so tenuous that existence of the claimed right is at best merely possible.

2. Whether a period of two (2) months after publication of a decision of a Court of Appeals is a reasonably sufficient time in the absence of any relevant decision of this Court or any other Court of Appeals, for a state mental hospital nurse and security officer to (1) learn of that decision, which held for the first time in that Circuit that under the Eighth Amendment and based on his duty to enforce the law a state correctional officer (prison guard) is liable for failure to intervene to prevent or stop the physical assault of a prisoner by other guards, (2) assess what, if any, application the decision had to their own duties relating to the care and treatment of state mental hospital patients, and (3) adjust their conduct accordingly, for purposes of determining whether they are entitled to qualified immunity from money damages liability in a 42 U.S.C. § 1983 action brought by a state mental hospital patient alleging he had a right protected under the Due Process Clause of the Fourteenth Amendment for the nurse and hospital security officer to intervene to stop his being physically assaulted by other hospital employees.

LIST OF PARTIES

The parties to the proceedings below consisted of:

a. Russell Durham, Plaintiff-Appellant;

b. Donnie Glover, Defendant-Appellee;

c. George Nichols, Defendant-Appellee;

d. Becky Ahlers, Defendant-Appellee;

e. Nasiruddin Siddiqui, Defendant-Appellee; and

f. Farahieh Rabbani, Defendant-Appellee.

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RUSSELL DURHAM - - - - - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, Donnie Glover and Becky Ahlers, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 97 F.3d 862 (6th Cir. 1996), and is reprinted in the Appendix hereto, page 1a, *infra*. A copy of the unreported Order of that Court denying a petition for rehearing en banc and suggestion for rehearing en banc, is in the Appendix hereto, page 18a, *infra*.

Copies of the unreported Orders, Opinion and Judgments of the United States District Court for the Western District of Kentucky in this case are in the Appendix, pages 19a-32a, *infra*.

JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit was entered on October 9, 1996. (App., *infra*, 1a). The Order denying a petition for rehearing was entered on November 22, 1996. (App., *infra*, 18a): The jurisdiction of this Court to review the Opinion of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1. 42 U.S.C. § 1983: Civil Action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

2. Amendment XIV, United States Constitution, Section 1: Citizenship; Due Process; Equal Protection.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; not deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners were employees of a state mental hospital in August 1990, when an incident occurred involving an alleged physical assault of the Respondent, then an involuntary state mental hospital patient, by two other employees who attempted to restrain the patient when he tried to kick one of those employees after the patient refused to clean up a mess he had made on the floor. Petitioner Donnie Glover was a hospital security officer and Petitioner Becky Ahlers was a nurse at the time of the incident.

Respondent brought an action in U.S. District Court for money damages under 42 U.S.C. § 1983 against the two state mental hospital employees who allegedly assaulted him, as well as against the Petitioners, two doctors who treated him after the incident, and the hospital administrator. The jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331 and 1343.

Petitioners were alleged to have violated the patient's rights under the Fourteenth Amendment by failing to intervene to protect him when they witnessed his being assaulted by the two other employees. The District Court granted motions for summary judgment for Petitioners, the doctor and the administrator. However, no action has been taken by the District Court with regard to the claims against the two employees who allegedly assaulted the patient.

As to Petitioners, the District Court found that the patient's right to have state mental hospital employees intervene to protect a patient from physical assault by other hospital employees was not so clearly established in

August 1990 as to be enforceable in an action against those non-intervening employees for money damages under § 1983. The patient appealed, and the Court of Appeals reversed, one Judge concurring in part and dissenting in part, as to Petitioners. Summary Judgment for the doctors and administrator was affirmed.

On appeal, the majority analyzed the liability of the non-intervening employees and concluded that neither the hospital security officer nor the nurse had qualified immunity from suit in the case. The Court of Appeals found that the position and duties of a hospital security officer were sufficiently analogous to those of the police officers in *Bruner* v. *Dunaway,* 684 F.2d 422 (6th Cir. 1982), who were liable under § 1983 even though they had not actively participated in an arrestee's assault, as well as to those of the correctional officers in *McHenry* v. *Chadwick,* 896 F.2d 184 (6th Cir. 1990), who were liable under § 1983 for not protecting an inmate from assault by other correctional officers. The Court also found that the precedent of those cases "was sufficient to place the nurse . . . on notice that she had a duty to protect . . . [the patient] while in her charge. . . ." 97 F.3d at 868.

Petitioners timely filed a petition for rehearing and suggestion for rehearing en banc. That petition was denied. Petitioners now seek review by this Court of the Court of Appeals' decision denying them qualified immunity.

That decision has the effect of eliminating the defense of qualified immunity for all similarly situated state mental hospital staff and employees in Kentucky, Michigan, Ohio and Tennessee. It also imposes on those employees a duty to intervene in any situation where they become aware a patient may (arguably) be physically harmed by other employees, in order to prevent or to try to prevent that harm, or to stop or try to stop further harm to the patient.

That duty is now enforceable under 42 U.S.C. § 1983 by all patients of state mental hospitals. For patients who are deemed incapacitated (by age or mental incompetency) under state law, the applicable statute of limitations is tolled until removal of such incapacity or death for any cause of action accruing on and after August 1990.

Unless this Court of agrees to review the case or the matter is settled, both Petitioners face summary judgment or trial on the merits of their alleged liability for money damages. Neither Petitioner has insurance to cover such judgment. There is no authority for their employer at the time of the alleged incident, the Commonwealth of Kentucky, to pay any judgment that may be awarded against the Petitioners. Nor is there any authority for the State to indemnify them for any judgment.

REASONS FOR GRANTING THE PETITION

As the Court of Appeals acknowledged in its decision in this case, 97 F.3d at 867, there had until that decision not been any case in the Sixth Circuit holding that a state mental hospital employee is liable under § 1983 for failing to intervene to protect a patient from being physically assaulted by another hospital employee. Nor does the Court of Appeals cite in that decision any case of this Court or any other Circuit so holding. It did not do so because there is no such case.

Although this is a case of first impression, it should be reviewed. Petitioners were erroneously denied qualified immunity, and the Sixth Circuit's attempt to establish a new standard for determining that immunity raises an issue of exceptional importance. Unless the denial of qualified immunity in this case is reviewed, the decision will be an invitation to the Courts of Appeals in other Circuits to apply the Sixth Circuit's new standard in order to create, *ex post facto,* rights where none clearly existed before, in

order to provide a money damages remedy to § 1983 plaintiffs who will otherwise only receive the satisfaction that their case establishes a new right that can be enforced by others in the future.

Such a slippery slope can be avoided only if this Court grants this Petition. To do otherwise will mean the abandonment of all of the protections this Court has thus far developed for § 1983 defendants under the qualified immunity doctrine and the subjugation of those defendant to potentially unlimited liability.

I. The Decision of the Court of Appeals Denying Petitioners Qualified Immunity is Erroneous

1.

The Court of Appeals erred in holding that the position and duties of a hospital security officer at a state mental hospital are analogous to those of a police officer making an arrest and to those of a corrections officer under the Eighth Amendment.

The Court of Appeals held that Petitioner Glover's position as a hospital security officer ("HSO") was analogous to the position of the police officers in *Bruner* v. *Dunaway*, 684 F.2d 422 (6th Cir. 1982) and the corrections officers in *McHenry* v. *Chadwick*, 896 F.2d 184 (6th Cir. 1990), because HSOs have a "badge of authority" to keep the peace in state mental hospitals, 97 F.3d, at 868. In both *Bruner, supra,* and *McHenry, supra,* the defendants' liability was based on their status as low enforcement officers. The Court in *Bruner* relied on *Smith* v. *Ross,* 482 F.2d 33 (6th Cir. 1973) (per curiam), which had held that "a law enforcement officer can be liable under § 1983 when by his inaction he fails to perform a statutorily imposed duty to enforce the law equally and fairly". 97 F.3d, at 867. The Court in *McHenry* applied *Bruner* to the "prison context", and held that "a correctional officer who observes an unlawful beating may, nevertheless, be held liable under § 1983 without actively participating in the unlawful beating". *McHenry, supra,* 896 F.2d at 188. In *McHenry* the

Court reasoned that the basis of the prison guards' liability was the duty they owed an inmate of protection from assaults by other guards, citing *Bruner* for the proposition that a police officer has a duty to try to stop another officer who summarily punishes a person in the first officer's presence. *McHenry,* at 188, citing *Bruner* at 426.

Under Kentucky law, police officers are sworn law enforcement officers, while correctional officers (state prison guards) have all the authority and powers of peace officers, including the power of arrest, while maintaining custody over prisoners. However, as a hospital security officer Petitioner Glover was neither a police officer, nor a correctional officer. He had no "badge of authority" because he had no statutorily imposed duty to enforce the laws equally and fairly, or for that matter to enforce the laws at all. Nor did he have the powers or authority of a prison guard. Indeed, the Respondent was a mental patient, not a prisoner in August 1990. Rather, Petitioner Glover was merely an employee of a state mental hospital in the nursing department. In holding otherwise, the Court of Appeals obviously chose to ignore Petitioner Glover's job description, which was of record in the action, A-304-306; R.-137, Exhibit H, and which was specifically pointed out to the Court as Exhibit 2 to the petition for rehearing. (App., *infra,* 33a-36a).

As can be seen from that job description, an HSO's services are non-professional and non-technical in the direct care of psychiatric patients. He needs only a high school diploma or GED equivalency; nursing experience in a psychiatric facility is preferred, but not required. He works under the supervision of the nursing staff, and supervises no one. He assists the patients in activities of daily living, assists with patient treatment procedures, and assists with behavioral problem patients, including restraining and secluding them. None of those duties fall under either the Fourth or Eighth Amendment.

Although Petitioner Glover was not a corrections officer, the evidence of record shows there were corrections officer ("COs") at the state mental hospital for security purposes at the time of the incident in August 1990. However, the COs did not work on units or have anything to do with patient care. Instead, there were nurses, patient aides, and HSOs to work with the patients. The COs were at security desks, on call to respond to emergencies as they arose, A CO was called to respond to the incident involving Respondent in August 1990.

Therefore, for the Court of Appeals to conclude in this case that the position and duties of an HSO is analogous to that of a police officer in a Fourth Amendment context as well as to that of a correctional officer in an Eighth Amendment context is clearly erroneous. Such analogy has no basis in either law or fact. Likewise erroneous are the Court of Appeals' conclusions as to a state hospital nurse.

2.

The Court of Appeals erred in holding that in involuntary mental health patient had a right enforceable under § 1983 in August 1990 to have a state mental hospital employee intervene to stop the physical assault of such patient by another hospital employee, because at that time there was no decision so holding of this Court, the Sixth Circuit, any other U.S. Circuit Court of Appeals or the Supreme Court of Kentucky.

The Court of Appeals concedes, 97 F.3d at 867, that there was no precedent in the Sixth Circuit for the right it says existed so "unmistakably" in August 1990. Nor does the Court of Appeals point to any other "applicable direct authority" that would leave "no doubt in the mind of a reasonable . . . [hospital security officer or nurse in August 1990] that his [or her] conduct [then], if [later] challenged on constitutional grounds, would be found wanting" by that Court—even if not by the trial court or by the dissenting judge on this appeal. *Ibid* (citation omitted). The Court of

Appeals does not do so because there was not any such precedent in the Sixth or any other Circuit, or in any other Court, including this Court or the Supreme Court of Kentucky. Nor is there any other such precedent at this time.

Rather, the Court of Appeals erroneously equated the position and duties of a state mental hospital security officer to that of the police officers in a Fourth Amendment context in *Bruner, supra,* who had "a statutorily imposed duty to enforce the laws equally and fairly". 884 F.2d at 426 (citation omitted), even though there is nothing in the record of this case that Petitioner Glover had any such statutory duty in August 1990. *See* discussion above. It is also clear that the Fourth Amendment did not apply in any way to the incident involved in this appeal.

The Court of Appeals also equated a state mental hospital to the Eighth Amendment context of a prison in its reference to the position and duties of a correctional officer in *McHenry, supra.*. There is no precedent for such analogy, and the Eighth Amendment does not apply in any way to the incident involved in this appeal. Thus, there was no basis in either law or fact for the Court of Appeals to conclude as it did, 97 F.3d 868, that *Bruner, supra,* and *McHenry, supra,* were "sufficient to place . . . nurse [Ahlers] . . . on notice that she had a duty to protect . . . [Respondent] while under her charge. . . ." A nurse is obviously neither a police officer nor a prison guard. Moreover, no precedent is given for this novel conclusion, which is little more than the "should have known" element of a state law tort action. In any case, negligence fails to state any claim upon which any relief can be granted under § 1983. See, e.g., *Collins* v. *City of Harber Heights, Tex.*, 503 U.S. 115 (1992).

3.

Two (2) months was not a reasonable time for employees of a state mental hospital to learn of the publication of a decision holding state correctional officers (prison guards) liable under the Eighth Amendment for failing to intervene to stop the physical assault of a prisoner by other prison guards, to assess any application that decision had to their own duties relating to patient care and treatment, and to adjust their conduct accordingly.

The decision upon which the Court of Appeals so heavily relies, *McHenry, supra,* was not decided until February 1990, just six months before the incident that is the subject of the instant Petition. Moreover, the volume in which that decision was published, 896 F.2d, was not received in the law library of the Office of the Counsel of this State agency until June 1990, just two months before that incident. Under those circumstances it was not objectively reasonable for the Court of Appeals to assume, as it apparently did, that Petitioners knew or should have known about *McHenry,* and that they should have understood that this prison case was so analogous to their situation in a state mental hospital that they had to conform their conduct accordingly under the facts they were faced with in the incident involving the assault of Respondent. Indeed, the Court of Appeals had only recently recognized that state employees such as these Petitioners should be given a reasonable time to learn about new controlling precedent in Sixth Circuit Court decisions and to adjust their conduct accordingly. *Lintz* v. *Skipski,* 25 F.3d 304, 306 (6th Cir. 1994), *cert. denied,* 115 S.Ct. 485 (1994), holding that "[a] court should apply a rule of reason in each case with respect to compliance with new decisions. As with other similar timing problems . . . the question is one of fairness in light of all the facts." Unfortunately for Petitioners, that rule of reason was not applied by the Court of Appeals in this case.

Furthermore, even from today's perspective, it is clear that *McHenry* does not point unmistakably to the unconstitutionality of Petitioners' conduct as state mental hospital employees in failing to intervene to stop an assault on Respondent. Thus, in August 1990 such unconstitutionality was not so clearly foreshadowed by applicable direct authority so as to inform a reasonable state mental hospital security officer or a reasonable state mental hospital nurse that her conduct, without question, was then unconstitutional.

For these reasons there is no doubt such right was not clearly established in August 1990. However, even if the Court of Appeals was correct in concluding that *McHenry* was sufficient to place Petitioners on notice in August 1990 of their duty to intervene, under the circumstances pointed out above it is clear they did not have sufficient time to learn about and adjust to the new decision.

In *Anderson* v. *Creighton*, 483 U.S. 635 (1987), this Court reviewed the principles under which state employees such as Petitioners are shielded from personal monetary liability and harassing litigation, including the principle that "qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law'", *id.*, 483 U.S. at 638 (citation omitted), and struck a balance between the vindication of constitutional rights and the effective performance of official duties so as to avoid turning the rule of qualified immunity into some kind of "rule of virtually unqualified liability", *id.*, 483 U.S., at 641. This Court did so by reiterating the standard it established earlier in *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818-9 (1982), in holding that "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action turns on the 'objective legal reasonableness' of the action, . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken." . . . *Anderson* v. *Creighton*, *supra*, 483 U.S., at

639. Then this Court emphasized that the right allegedly violated "must have been 'clearly established' in a more particularized, and hence more relevant sense" than the level of generality usually applied to constitutional and statutory violations. *Id.*, 483 U.S., at 640. Hence, this Court concluded, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what [s]he is doing violated that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been unlawful, . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Ibid* (citations omitted). It is clear that the Court of Appeals misapplied these principles in denying Petitioners qualified immunity in the instant case.

Even if the Court of Appeals had correctly determined that a right of a state mental health patient to have a state mental hospital employee intervene to stop the physical assault of that patient by other hospital employees exists now, there is no doubt such right was not so "sufficiently clear" come six years and one-half ago that a reasonable hospital security officer and a reasonable nurse employed at a sate mental hospital in August 1990 were fully aware that their failure to intervene to stop such an assault would violate that right. Nor was the unlawfulness of their not intervening obvious in light of the reported cases of which a reasonable state mental hospital security officer and nurse would know about at that time. *See also* the reasoning of the dissent in this case, 97 F.3d 870.

II. The Issues Involved in the Denial of Qualified Immunity in this Case are Sufficiently Important to Warrant Review by this Court.

This is a case of utmost importance that should be reviewed by this Honorable Court. It is, of course, very important to petitioners herein, who now stand alone in

potential liability for physical harm they did not cause some six and one-half years ago. It is also of no small importance to all other similarly situated state mental hospital staff, Who, because of the decision denying petitioners qualified immunity, are themselves in harms way and therefore potentially liable for the acts of others going back to August 1990.

More importantly, the decision in this case, now published at 97 F.3d 862, should be reviewed because in denying Petitioners qualified immunity the United States Court of Appeals for the Sixth Circuit abandoned the objective reasonableness test for such immunity articulated by this Court in *Harlow v. Fitzgerald, supra,* and *Anderson v. Creighton, supra,* and established a new standard without reference to any precedence of this or any other Court. Under the Sixth Circuit's new test the issue of whether a particular right was clearly established at the time of an alleged constitutional wrong so as to deny qualified immunity is to be answered in the affirmative whenever preexisting case law simply suggests, merely allows, or possibly raises the existence of the claimed right. Thus, the unlawfulness of what a defendant is doing or not doing no longer must be apparent in light of preexisting law before a right can be found to be clearly established. Nor will a clearly established right any longer be found only where the contours of a claimed right are so sufficiently clear, at the time of the alleged conduct, that a reasonable state employee in a particular position would understand that what she is doing or not doing violated that right.

Rather, all that is required now is some pre-existing case, however new or novel, or unrelated it may be to the facts at hand. There doesn't even need to be any analogy between the situation of the defendants in that case and that of the defendants now. Or, if there is one, it no longer matters how tenuous that analogy may be between the facts and circumstances in one and that of the other.

As a result, the concept of clearly established rights established by this Court has been stood on its head. Indeed, as it stands now in the Sixth Circuit, the delicate balance that has been heretofore so carefully struck by this Court between the vindication of citizens' constitutional rights and the effective performance by public employees of their duties has all but been destroyed. No longer is there any workable standard in this Circuit by which they can reasonably anticipate if or when their conduct will give rise to liability for damages.

Moreover, the decision denying Petitioners qualified immunity should be reviewed because in making its decision is this case of the Court of Appeals also failed to determine whether reasonable state employees in the Petitioners' respective positions (state mental hospital nurse and security officer) would have understood that their particular conduct was unlawful or could have believed that their actions were unlawful in light of the facts and circumstances surrounding the particular incident and the information each petitioner possessed at the time of the incident. By failing to make that inquiry, which this Court held in *Anderson* v. *Creighton, supra,* is required even when a claimed right is found to be clearly established, the Court of Appeals again substituted its own assumptions and an apparent desire to provide the plaintiff below with money damages relief from someone, for the standard previously established by this Court in *Harlow, supra,* and *Anderson, supra,* as later modified in *Siegert* v. *Gilley,* 500 U.S. 226 (1991), and recently reaffirmed in *Behrens* v. *Pelletier,* ___ U.S. ___, 116 S.Ct. 834 (1996).

Finally, this case is an excellent opportunity for this Court to provide guidance to the Circuits on the very important matter of what constitutes a fair and adequate length of time for state action defendants to learn of a new decision and to adjust and conform their conduct accordingly, Such guidance will relieve the uncertainty of all

such defendants, while providing much needed clarification for the lower courts with respect to the rule of reason that should be applied with respect to compliance with new decisions.

CONCLUSION

For the following reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

[EXCERPTS FROM 97 FEDERAL REPORTER, 3D SERIES]

Russell DURHAM, Plaintiff-Appellant,

v.

Mahdee NU'MAN; Roy Hill; James Burke; Ricky Rhodes,

Defendants,

Donnie Glover; George Nichols; Becky Ahlers; Nasiruddin Siddiqui; Farahieh Rabbani, Defendants-Appellees.

No. 95-5843.

United States Court of Appeals,
Sixth Circuit.

Argued June 6, 1996.

Decided Oct. 9, 1996.

Patient at state hospital brought § 1983 action against hospital staff and physicians arising out of assault by hospital security officers. The United States District Court for the Western District of Kentucky, Charles R. Simpson, J., granted summary judgment in favor of defendants. Patient appealed. The Court of Appeals, Merritt, Circuit Judge, held that: (1) security officer and nurse who witnessed beating could be held liable without having actively participated in beating; (2) physicians were not liable; and (3) administrator was not liable.

Affirmed in part and reversed in part.

Duggan, District Judge, sitting by designation, concurred in part and dissented in part with separate opinion.

1. Federal Courts—Key 776

Court of Appeals' review of grant of summary judgment is de novo.

2. Federal Civil Procedure—Key 2543

On summary judgment motion, all facts, as well as all inferences drawn therefrom, must be viewed in light most favorable to nonmoving party. Fed.Rules Civ.Proc.Rule 56,28 U.S.C.A.

3. Civil Rights—Key 214(2)

Doctrine of "qualified immunity" protects government officials in civil cases from damages liability if their conduct does not violate clearly established statutory or constitutional rights of which reasonable person would have known.

See publication Words and Phrases for other judicial constructions and definitions.

4. Civil Rights—Key 214(2)

For right to be "clearly established" for purposes of qualified immunity defense, contours of light must be sufficiently clear that reasonable official would understand that his conduct violates that light; unlawfulness of official or employee's conduct must be apparent in light of preexisting law.

See publication Words and Phrases for other judicial constructions and definitions.

5. Civil Rights—Key 214(2)

Right is not considered "clearly established" for purposes of qualified immunity defense unless it has been authoritatively decided by United States Supreme Court, Court of Appeals, or highest court of state in which alleged constitutional violation occurred.

6. Civil Rights—Key 114

State hospital security officer who witnessed beating of shackled patient could be held liable under ˇ 1983 without having actively participated in beating; officer had badge of authority and duty to protect patient from assault by other officers. 42 U.S.C.A. ˇ 1983.

7. Civil Rights—Key 114

State hospital nurse who refused shackled patient's request to use restroom and who witnessed subsequent beat-

ing of patient by hospital security officers could be held liable under § 1983 without having actively participated in beating; precedent holding police officers and correctional officers liable for failure to intervene was sufficient to place nurse, who caused conflict, on notice that she had duty to protect patient while under her charge. 42 U.S.C.A. ˇ 1983.

8. Civil Rights—Key 114

Whether treating physicians were deliberately indifferent to medical needs of state hospital patient required court to ask whether deprivation was sufficiently serious and whether officials acted with sufficiently culpable state of mind. 42 U.S.C.A. § 1983.

9. Civil Rights—Key 114

Physicians who treated state hospital patient after patient was assaulted by hospital security officers did not display deliberate indifference in treatment so as to be liable for § 1983 damages even though physicians initially failed to order tests which would have permitted diagnosis of broken arm where it was not readily apparent that arm was broken and patient received medical treatment after incident. 42 U.S.C.A. § 1983.

10. Civil Rights—Key 114

State hospital administrator was not liable under § 1983 to patient who was assaulted by hospital security officers in absence of evidence that administrator implicitly authorized, approved, or knowingly acquiesced in any of conduct which formed basis for complaint. 42 U.S.C.A. § 1983.

Gail Robinson (argued and briefed), McNally & Robinson, Frankfort, KY, Russell J. Baldani (briefed), Baldani, Rowland & Richardson, Lexington, Ky, for plaintiff-appellant.

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Michael R. Greene (argued and briefed), Fischer, Thomas, Brophy & Shake, Louisville, KY, for defendant-appellee Nasiruddin Siddiqui.

Gregory J. Bubalo, Douglas C. Ballantine (argued and briefed), Ogden, Newell & Welch, Louisville, KY, for defendant-appellee Farahieh Rabbani.

Before: MERRITT and COLE, Circuit Judges; DUGGAN, District Judge*.

MERRITT, J., delivered the opinion of the court, in which COLE, J., joined. DUGGAN D.J. (p. 870), delivered a separate opinion concurring in part and dissenting in part.

MERRITT, Circuit Judge.

Plaintiff Russell Durham appeals the District Court's grant of summary judgment for the five defendants in this 42 U.S.C. § 19 suit arising out of an August, 1990, assault by hospital security officers at Kentucky's Central State Hospital. There are three sets of defendants: the nurse and hospital secure officer who witnessed the beating and did nothing to stop it; the two doctors who treated the plaintiff after the beating but did no diagnose his broken arm; and the administrator of the hospital who, plaintiff claim did not have sufficient policies to prevent violent altercations, understaffed the hospital's wards housing potentially violent patients, and failed to train the hospital staff to deal with such patients.

As to the nurse and security officer who failed to try to stop the beating, the District Court granted summary judgment because the cases that have held that a failure to intervene may be a violation of § 1983 have dealt only with

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*The Honorable Patrick J. Duggan, United State District Judge for the Eastern District of Michgan, sitting by designation.

police and correctional officers, not state mental health workers in a hospital for the criminally insane. The Court believed that the cases, therefore, do not "clearly establish" the constitutional duty of these defendants to try to stop the beating.

As to the second set of defendants, the treating physicians, the District Court held that the plaintiff had failed to satisfy both the objective and subjective components of the "deliberate indifference" standard by which these violations are to be judged.

As to the last defendant, the administrator of the Central State Hospital, the District Court held that there was no evidence that the defendant had implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending employees, and therefore summary judgment was appropriate.

FACTS

Russell Durham was committed to Eastern State Hospital in February 1990 because he had been found incompetent to stand trial for assault. He was transferred to Central State Hospital in August 1990. Prior to the beating, the plaintiff was in seclusion and was shackled with a "saddle" or belt restraining him at the wrists and legs. He was placed in Unit S, the unit designated for the more unruly patients. Durham had been shackled for two days at the time of the incident. He approached the nurse's station on August 27, 1990, and asked the nurse there, Becky Ahlers, if he could go to the bathroom and then lie down. Apparently Nurse Ahlers had a policy that patients in seclusion could only go to the bathroom during fifteen minutes every hour. If the patient cannot wait and relieves himself in his clothes, he is punished.

Nurse Ahlers claims that she did not hear Durham's request, but he claims that she refused his request. The plaintiff then urinated on himself and on the floor in front of the Nurse's station and walked back down the hall to the activity room, tracking urine with him as he went.

Mahdee Nu'Man, one of the Hospital Security Officers, and Nurse Ahlers determined that Durham should be made to clean up the urine. Durham refused to clean up the urine, and Ahlers ordered Nu'Man to put Durham in seclusion as punishment for not cleaning up his mess. Durham apparently kicked at Nu'Man at this point, and Durham claims that Nu'Man then grabbed him and forced him to the floor. Durham claims that another officer, Ricky Rhodes, repeatedly picked Durham up by his shackles and dropped him back onto the floor. Durham also says he was kicked and kneed, A third officer, Donnie Glover, who admits being present during the incident, denied that Nu'Man or Rhodes kicked or beat Durham at all. He swore that they were only trying to restrain him. Therefore, under Durham s account of the incident, Glover stood by and did nothing while he was beaten by Nu'Man and Rhodes. In addition, officer Roy Hul testified that Glover was actively involved in the incident, and that he assisted in lifting Durham. Nurse Ahlers also testified that she thought that Glover-was in the activity room during the incident.

Nurse Ahlers admitted seeing some of the fracas which occurred between Nu'Man, Rhodes and Durham, initially from the monitor at the Nurse's Station, and then later from the doorway of the activity room. Officer Roy Hill testified that Ahlers could see into the activity room during the incident. At no time did Nurse Ahlers or Donnie Glover attempt to put an end to the incident by intervening or by calling for help.

After the incident, Dr. Rabbani was called to attend to Durham. She was the psychiatrist on duty at the time of the incident. When she first saw Durham, she said "My God . . . what happened?" Dr. Rabbani sutured the cut over Durham's eye. Nurse Judkins, who was present at the time, testified that Durham told her and Rabbiini that his arm was broken. Dr. Rabbani testified that she asked Durham if his arm was in pain, and he said it was not. Apparently Dr. Rabbani did examine his arm even though Durham allegedly denied having pain. Although she noted a linear abrasion, she did not notice any discoloration or

bruising, and did not order an X-ray. Judkins testified that Durham, when questioned if his arm was in pain said "hell yes it hurts." Ahlers also examined Durham's arm, and Durham also told her that it was broken. After the examination, Durham was placed in more severe shackles in seclusion.

The next day, Dr. Siddiqui, the plaintiffs regular doctor (also a psychiatrist) examined the plaintiff. Dr. Siddiqui made notes about the surface injuries to the plaintiffs arm, but the plaintiff nonetheless claims that the doctor did not examine his arm. At 1:30 p.m. on the following day, August 29th, Durham complained of a broken arm. No doctor saw the plaintiff that day. The next morning, the plaintiff again complained of the pain, and stated that he thought his arm was broken. Although the plaintiff asserts that the interdisciplinary progress notes do not state that there was an exam by Dr. Siddiqui on the 30th, Dr. Siddiqui testified that he noted some swelling and then ordered an X-ray of the plaintiffs arm.

The X-ray revealed that Durham had a broken arm. Dr. Steven Henry, the plaintiffs treating physician at Humana, described his injury as a "Night-stick" fracture. He also testified that it would be normal for swelling not to occur for the first 24-36 hours and that it is common for X-rays not to be taken immediately for these types of injuries. The plaintiffs arm was casted, and then recasted. Finally, a metal plate was inserted to aid in the healing process. The arm apparently healed.

The plaintiff also asserts a claim against the supervisor of the hospital, Nichols. Units R and S of the Central State Hospital in the Grauman Building were opened in 1989 to deal with patients who have a potential to be more violent. Plaintiff asserts that Unit S, where the plaintiff was a patient, was understaffed. He also attacks the adequacy of the training offered at Central State Hospital. Officers were only required to have the equivalent of a high school education and be able to read and write and have passed the Driver's test. They were not required to

have any prior experience with psychiatric patients. Although there was a two week training session, only four and one half hours of that training were devoted to the treatment and care of potentially violent patients or the proper use of restraints and seclusion. In addition, this training was conducted by correctional personnel, and not by mental health personnel. There was also no annual retraining until after the incident at issue in this case.

ANALYSIS

I. The Liability of the Nurse and Security Officer for Failure to Intervene

[1, 2] Our review of a grant of summary judgment is *de novo*. Summary judgment is only appropriate where the "pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). All facts, as well as all inferences drawn therefrom, must be viewed in the light most favorable to the nonmoving party. *Matsushita Electric Industrial Co., Ltd., et al. v. Zenith Radio Corp., et al.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

[3-5] The doctrine of qualified immunity protects government officials in civil cases from damages liability, *Rich v. Mayfield Heights*, 955 F.2d 1092, 1094 (6th Cir.1992), if their conduct does not "violate clearly established statutory or constitutional tights of which a reasonable person would have known," *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). For a light to be "clearly established," the contours of the right must be sufficiently clear that a reasonable official would understand that his or her conduct violates that light. The unlawfulness of the official or employee's conduct must be apparent in light of pre-existing law. *Wegener v. City of Covington*, 933 F.2d 390, 392 (6th Cir.1991). A right is not considered clearly established unless it has been authoritatively decided by the United States Supreme Court, the

Court of Appeals, or the highest court of the state in which the alleged constitutional violation occurred. *Robinson v. Bibb*, 840 F.2d 349, 351 (6th Cir.1988). The law requires that,

> [T]hose decisions must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting.

Ohio Civil Serv. Employees Ass'n v. Seiter, 858 F.2d 1171, 1177 (6th Cir.1988).

Bruner v. Dunaway, 684 F.2d 422 (6th Cir.1982), guides our reasoning in this case. There, the Court held that "it is not necessary, in order to hold a police officer liable under § 1983, to demonstrate that the officer actively participated, in staking a plaintiff." In *Bruner*, the plaintiff was asleep in his car when he was awakened by a police officer of the city of Knoxville, Tennessee and asked to exit his vehicle. Plaintiff Bruner testified that he was then struck repeatedly with a flashlight or a club. After fleeing the scene of the first beating, Bruner was confronted by a reserve police officer in an alley, and was repeatedly struck and kicked by other unidentified persons as he was dragged down the alley. There were eight defendants in *Bruner*, all of whom admitted that they were present during the various stages of the incident. The jury returned a verdict for Bruner, but on motion of the defendants, the District Court set aside the verdict on the ground that in order to be held liable under § 1983, personal involvement must be shown. After a second trial, the jury found for Bruner as to three of the defendants, found against Bruner as to two of the defendants, and the Court directed a verdict as to the remaining three defendants. On appeal, Bruner argued that even if the evidence did not demonstrate personal involvement as to some of the officers, the inaction of the "nonparticipating" officers while Bruner was being assaulted subjected those officers to liability. *Bruner*, 684 F.2d at 424. In holding that the officers who stood by and

did nothing while Bruner was beaten by other officers could be held liable, the Bruner court relied on *Smith v. Ross,* 482 F.2d 33 (6th Cir.1973) (per curiam). In Smith, although the Court found that a deputy's acts were not the cause of the harm suffered by plaintiffs, the Court stated that "a law enforcement officer can be liable under § 1983 when by his inaction he fails to perform a statutorily imposed duty to enforce the laws equally and fairly", and "acts of omission are actionable, in this context to the same extent as acts of commission." Smith, 482 F.2d at 36.

The *Bruner* court also relied on *Byrd v. Brishke,* 466 F.2d 6 (7th Cir.1972). The plaintiff in *Byrd* testified that unidentified offic s beat him in the back room of a tavern. Byrd was able to identify three officers who were present at the time of the beating, though he was unable to identify those who actually beat him.. The district court directed a verdict for the defendants at the close of evidence, and the Seventh Circuit reversed on appeal, holding that "one who is given the badge of authority of a police officer may not ignore the duty imposed by his office and fail to stop other officers who summarily punish a third person in his presence or otherwise within his knowledge." Id. at 11.

In *McHenry v. Chadwick,* 896 F.2d 184 (6th Cir.1990), the Court applied *Bruner* to the "prison context" and held that "a correctional officer who observes an unlawful beating may, nevertheless, be held liable under § 1983 without actively participating in the unlawful beating." *McHenry,* 896 F.2d at 188. "[E]ven if one or more of the officers did not actively participate in the beating, they still owed McHenry a duty of protection." *Id. In McHenry,* the prisoner was serving a nine-year sentence at Brushy Mountain Prison. On two separate occasions, he was taken from his cell and led to remote parts of the prison where he was confronted by corrections officers about stealing from one inmate and threatening the life of another. On the first occasion, one corrections officer taunted him, twisted his arm, and threw him to the ground while approximately five other corrections officers were present. McHenry filed a complaint about the incident, and the next morning, the

same corrections officer removed him from his cell and escorted him to the prison hospital. Five other officers were also present during this incident. One officer, after putting on leather gloves, struck McHenry in the back, causing him to fall to the floor and hit his head on the wall. The other officers then "rushed into the holding cell and proceeded to strike McHenry in the back, stomach, and legs; including Lonnie Daugherty who struck McHenry's leg with a billy club." *Id.* at 186.

The jury returned a verdict for McHenry on his § 1983 suit for deprivation of civil rights, and the District Count denied the defendants' motions for judgment notwithstanding the verdict or in the alternative for a new trial. On appeal, the Court affirmed the District Court's refusal to grant a new trial or judgment notwithstanding the verdict, holding that the trial court had properly instructed the jury that under Bruner, a corrections officer who observes an unlawful beating may be held liable under § 1983 even though he or she did not actively participate in the unlawful beating.

Although there has not yet been a case in this Circuit specifically holding that a hospital security officer can be held liable under § 1983 for failing to protect a patient or inmate from being beaten by another hospital security officer, it is not necessary that there be a specific holding in order to find that a constitutional rule in the § 1983 area has been "clearly established." It is sufficient that the case law "both point[s] unmistakably to the unconstitutionality of the conduct complained of" and that "applicable direct authority . . . leave[s] no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting." *Ohio Civil Serv.*, 858 F.2d at 1177.

In this case, Glover is a hospital security officer. The facility is a state-run mental health hospital. The plaintiff was held in custody in the wing of the hospital reserved for patients who were prone to violence. The plaintiff himself was in the Central State Hospital instead of in prison be-

cause he was found incompetent to stand trial. Others in the Hospital are criminally insane as well.

[61 As a hospital security officer, Glover is analogous to the police officers in *Bruner* and the corrections officers in *McHenry*. Just as the police officers in Bruner, the hospital security officers have a badge of authority; they keep the peace in the Central State Hospital. Just as the corrections officers in *McHenry*, the hospital security officers have a duty to protect inmates or patients from assault by other officers. Just as the plaintiffs in both *McHenry* and *Bruner* Durham was totally dependent on the staff, both security and medical, of the Central State Hospital. The circumstances of the incident in this case evidence the custodial nature of the facility. Durham was in shackles when the assault took place. He was unable to defend himself against the attacks of Mahdee Nu'Man and Ricky Rhodes. A jury could conclude on the basis of the disputed facts that Glover should have come to Durham's aid, instead of standing idly by, allowing the assault to continue unfettered. The decision of the District Court as to defendant Donnie Glover is therefore REVERSED.

[7] Taking the evidence in the light most favorable to plaintiff, it was Nurse Ahlers who initially refused Durham's request to go to the bathroom. After Durham urinated on the floor, it was Nurse Ahlers who directed Mahdee Nu'Man to tell Durham he must clean it up or face being placed back in seclusion. Her orders caused the conflict and then when the conflict flared, she stood idly by and watched the beating. Charge with the responsibility of taking care of patients, Nurse Ahlers became angry, shirke her responsibilities and allowed a patient in her care to be brutally beaten by hospital security officers. She watched the beaten unfold on her monitor from the nurse's station, and then from the doorway of the activity room, the room where the beating took place. The beating lasted approximately ten minutes, according to Nurse Judkins. Judkins stated that she went up to the main desk at the beginning of the incident and when she returned about 10 minutes later, Durham was in seclusion.

This time period was long enough for Nurse Ahlers to have been able to make a difference, either by directing the hospital security officers to stop their attack, or by calling security from the main building of the hospital. Coming to Durham's aid would not have required her to become physically involved in the incident.

Because the precedent holding police officers and correctional officers liable for failure to intervene was sufficient to place the nurse who caused the conflict on notice that she had a duty to protect plaintiff while under her charge, the judgment of the District Court granting summary judgment to Defendant Nurse Becky Ahlers is therefore REVERSED.

II. The Liability of the Doctors

In the case of *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), the Supreme Court established the standard for determining whether the facts alleged in a prisoner's complaint for improper medical care constitute a valid civil lights claim. In *Estelle,* the Court held "[i]n order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Id. at 106, 97 S.Ct. at 292. The *Estelle* Court also held that "an inadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind,'" *id.* at 105-6, 97 S.Ct. at 292, and that negligence or "medical malpractice" alone is insufficient to establish liability.

Especially relevant to this case, which involves the failure to order an X-ray of plaintiffs arm to enable the physicians to diagnose his broken arm, is the language from *Estelle* that "[a] medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment," and "at most . . . it is medical malpractice." Id. at 107, 97 S.Ct. at 293.

In granting summary judgment to Drs. Siddiqui and Rabbani, the Magistrate Judge stated:

> The lack of outward symptoms of a broken arm, plaintiff's alternating between claims of having a broken arm and denial of pain, the numerous times his arm was examined by medical personnel, and the medical evidence that the sort of fracture plaintiff suffered does not immediately cause swelling or bruising leads the Magistrate Judge to conclude that there is no genuine issue of material fact as to the objective component of the standard for deliberate indifference. While his injury was undeniably serious, it was not obvious. The physicians may have been negligent in failing to diagnose and treat plaintiffs arm in a timely manner, but ' medical negligence does not rise to the level of a constitutional tort.

The Magistrate also found that there was no genuine issue of material fact as to the subjective component of the deliberate indifference analysis:

> Plaintiff has also failed to raise a genuine issue of material fact regarding the subjective component of "deliberate indifference," i.e. a culpable state of mind on the part of the defendants. There is no evidence that Dr. Siddiqui or Dr. Rabbani acted with obduracy or wantonness toward plaintiff or that they intentionally withheld medical care they knew to be necessary.

Id.

[8] The deliberate indifference test contains two components. The first is an objective one: Was the deprivation sufficiently serious? The second has a subjective element: Did the official act with a sufficiently culpable state of mind? *See Caldwell v. Moore,* 968 F.2d 595 (6th Cir.1992).

[9] The Magistrate's view of the case is correct. While Durham's broken arm was clearly a "serious medical need," it was not readily apparent that the arm was broken, and he did receive medical attention after the incident. He received sutures for the cut above his eye, and an examination was done of his arm. The broken arm was not displaying any swelling, and so it was not unreasonable or wanton for the two physicians to fail to diagnose that it was broken until several days later.

As to the culpable state of mind requirement, there is no evidence to suggest that either Rabbani or Siddiqui acted with wantonness. The Plaintiffs complaints go to the adequacy of the medical care; they do not raise an issue of unnecessary and wanton infliction of pain as required under *Estelle*. They were not deliberately indifferent to a serious medical need of the Plaintiff. The District Court grant of summary judgment as to these two defendants is therefore AFFIRMED.

III.The Liability of the Hospital Administrator

The District Court, in granting the defendant Nichols' motion for summary judgment, stated:

> The established law is clear that someone in a supervisory capacity, as Nichols was, must have at least implicitly authorized improved, or knowingly acquiesced in the unconstitutional conduct of the offending employee. *See Leach v. Shelby County Sheriff*, 891 F.2d 1241 (6th Cir.1989) and *Hays v. Jefferson*, 668 F.2d 869 (6th Cir. 1982). There is nothing in the record to show that this defendant implicitly authorized, approved, or knowingly acquiesced in any of the conduct which forms the basis of this complaint. It is clear to the Court that the defendant Nichols should be dismissed from this action.

[10] The plaintiff asserted in his brief that Nichols had not been deposed because the lower court would not permit discovery relevant to the claims against Nichols prior to the ruling on the motion for Summary Judgment. In fact, Nichols was deposed on August 24, 1993, after the trial court granted his motion for summary judgment. Since oral argument, Durham's counsel has withdrawn the argument that the claim against Nichols should be remanded to permit discovery, including Nichols' deposition. There is nothing in the record to show that this defendant implicitly authorized, approved, or knowingly acquiesced in any of the conduct which forms the basis of this complaint. Mr. Nichols was deposed and that deposition shows no knowledge or authorization in the conduct at issue here.

The plaintiff does not suggest that there was any evidence to the contrary. The District Court grant of summary judgment was therefore appropriate and is hereby AFFIRMED.

For the reasons stated above, the judgment as to defendants Glover and Ahlers is REVERSED, and the judgments as to the other three defendants are AFFIRMED.

DUGGAN, District Judge, concurring in part, and dissenting in part.

I concur with the majority except with respect to Nurse Ahlers. While I agree that the evidence, viewed in a light most favorable to plaintiff, could lead a jury to conclude that Nurse Ahlers had the opportunity and ability to prevent the beating, I am not persuaded that she had a "clearly established" duty to do so. I am aware of no precedent from this or any other court that has imposed liability on an individual (other than a police, correctional or security officer) for his or her failure to intervene, simply because he or she was, arguably, in a position to have prevented the beating.[1]

The doctrine of qualified immunity is intended to shield from suit those officials whose wrongful conduct[2] was not clearly established as a constitutional violation at the time the conduct occurred. "For a right to be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what [s]he is doing violates that right. To be outside the scope of qualified immunity, the very action in question need not have previously been held unlawful, but the unlawfulness must be apparent in light of pre-existing law." *Thomas v.*

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[1]I agree with the majority that defendant Glover, a security officer, occupies a "law enforcement" position and thus is not entitled to qualified immunity.

[2]In discussing the issue of "immunity", we assume that the conduct was "wrongful"; otherwise, there would be no need to discuss the issue of immunity.

Whalen, 51 F.3d 1285, 1289-90 (6th Cir.), *cert. denied*,— U.S.—, 116 S.Ct. 518, 133 L.Ed.2d 426 (1995). *See Walton v. City of Southfield*, 995 F.2d 1331, 1335-36 (6th Cir.1993).

While Nurse Ahlers' inaction was, at the very least, improper, I do not believe that it was "clearly established" that her failure to intervene would be deemed a *constitutional* violation. Because I do not believe that any decisions from this Court, or any other court for that matter, outline "the contours of the light" in a sufficiently clear manner so that a reasonable official in Nurse Ahlers' position would understand that what she was doing (or not doing) violates a constitutional right, *see Whalen* and *Walton*, I believe that Nurse Ahlers is entitled to qualified immunity. I would therefore affirm the District Court's decision with respect to her.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 95-5843

RUSSELL DURHAM, - - - - - - *Plaintiff-Appellant,*

v.

MAHDEE NU'MAN, Et Al. - - - *Defendants-Appellees.*

ORDER—Filed November 22, 1996

BEFORE: MERRITT and COLE, Circuit Judges; and DUGGAN, * District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Duggan would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

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*Hon. Patrick J. Duggan, United States District Judge for the Eastern District of Michigan, sitting by designation.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 91-0576 L-8

RUSSELL DURHAM, - - - - - - - - - *Plaintiff,*

v.

RICKY RHODES, Et Al. - - - - - - - *Defendants.*

FINDINGS OF FACT AND CONCLUSIONS OF LAW FINALIZING JUDGMENTS

On May 9, 1995, this case came before the Court for a pretrial conference. Present were Gail Robinson, counsel for plaintiff Russell Durham; Margaret Durham mother and legal guardian of the plaintiff; and Gregory Bubalo, counsel for Dr. Rabba Terry Morrison of the Cabinet for Human Resources, counsel for Becky Ahlers, Donald Glover and James Burke, participated by telephone. Also present was Mahdee Nu'Man, a defendant previously represented by Cabinet for Human Resources who is not represented by counsel at this time.

A. FINDINGS OF FACT

On August 26, 1991, plaintiff Russell Durham filed a complaint against eleven (11) defendants. The Cabinet for Human Resources filed an answer on behalf of defendants Ricky Rhodes, Mahdee Nu'Man, Donnie Glover, Roy Hill, Becky Ahlers, Susan Harris and James Burke. Subsequently, the Cabinet moved to withdraw from representing Mr. Rhodes and Nu'Man, citing a conflict of interest. Magistrate Gambill entered an order on November 20, 1992 permitting the Cabinet to withdraw. The Cabinet has not provided counsel for defendants Rhodes and Nu'Man and they have not retained counsel to represent them.

Defendants Roy Hill, Susan Harris, John Urton and James Burke were dismissed voluntarily by the plaintiff during 1993. The Court entered judgments dismissing George Nichols on February 19, 1993, and Donnie Glover, Becky Ahlers, Dr. Siddiqui and Dr. Rabbani on March 3, 1995. Also on March 3, 1995 the Court denied plaintiff's motion for default judgment against Ricky Rhodes, who had failed twice to appear for his deposition, but awarded costs to the plaintiff for expenses incurred with respect to those depositions. At the pretrial counsel for plaintiff advised that she is unable to locate Mr. Rhodes at this time. Mr. Nu'Man advised that he had repeatedly requested that Central State Hospital, by which he was employed at the time of the incident in question, provide counsel for him without success.

B. CONCLUSIONS OF LAW

Counsel for plaintiff and counsel for Dr. Rabbani have specifically requested that the judgments be made final and appealable at this time. This Court has considered the matter and has determined that the judgments dismissing the defendants previously named should be made final and appealable and that there is no just cause for delay.

Federal Rule of Civil Procedure 54(b) grants the trial court substantial discretion in determining whether to make a partial summary judgment final and appealable. At this time the only defendants which remain are Ricky Rhodes and Mahdee Nu'Man. Neither is represented by counsel, and the Court has expressed concern about the reasons for non-representation by the Cabinet for Human Resources. Only the case versus Mr. Nu'Man is ready for trial.

It is the Court's opinion that conducting a trial where only Mr. Nu'Man a defendant, and Mr. Nu'Man proceeding *pro se*, would be a waste of judicial resources. Additionally, and more critically, trying Mr. Nu'Man alone and then allowing an appeal with a later trial of other defendants and/or Mr. Nu'Man could result in inconsistent verdicts.

There are several distinctive issues in this case. The first is whether Mr. Rhodes and Mr. Nu'Man violated the United States Constitution by unnecessarily beating Mr. Durham. The second is whether Mr. Glover and Ms. Ahlers violated the United States Constitution by failing to intervene in that beating. The third is whether Drs. Rabbani and/or Siddiqui were deliberately indifferent to the medical needs of Russell Durham after he was injured. The fourth is whether George Nichols as director of Central State Hospital violated Mr. Durham's constitutional rights by failing to implement appropriate policies and/or to insist on appropriate training for personnel.

This Court believes that judicial economy will be served and the possibility of inconsistent verdicts avoided if the judgments dismissing Mr. Glover, Ms. Ahlers, Dr. Siddiqui, Dr. Rabbani and Mr. Nichols are made final and appealable at this time. Moreover, based on the reasons already stated, the Court determines that there is no just reason for delay.

WHEREFORE, the Court, pursuant to Federal Rule of Civil Procedure 54 (b), hereby makes final and appealable the following judgments of dismissal-the judgment dismissing Donnie Glover entered 3-3-95, the judgment dismissing George Nichols entered 2-19-93, the judgment dismissing Becky Ahlers entered 3-3-95, the judgment dismissing Dr. Siddiqui entered 3-3-95 and the judgment dismissing Dr. Rabbani entered 3-3-95.

/s/ Charles Simpson, III
Judge, United States District Court

Dated: 5/2/95

Entered: June 2, 1995

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 91-0576 L-(M)

RUSSELL DURHAM, - - - - - - - - - *Plaintiff*

v.

RICKY RHODES, Et Al. - - - - - - - *Defendants*

ORDER—Entered March 3, 1995

The above matter having been referred to United States Magistrate Judge C Cleveland Gainbill, and the Magistrate Judge having filed his Findings of Fact, Conclusions of Law and Recommendation, and objections having been filed, and the Court having made a *de* novo-determination of those portions of the Magistrate Judge's proposed Findings of Fact, Conclusions of Law and Recommendation to which objections have been made,

The Court accepts the Findings of Fact, Conclusions of Law and Recommendation of the Magistrate Judge, and

IT IS ORDERED that the motion for summary judgment of defendants Donnie Glover and Becky Ahlers be, and it is, hereby GRANTED, and they are dismissed from this action.

This is not a final and appealable Order.

/s/ Charles R. Simpson III
Charles R. Simpson III
Chief Judge, U.S. District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 91-0576-L(M)

RUSSELL DURHAM, - - - - - - - - - *Plaintiff*

v.

RICKY RHODES, Et Al. - - - - - - - *Defendants*

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION INTRODUCTION

This is a civil rights action filed pursuant to 42 U.S. C. § 1983 in which plaintiff alleges that his constitutional rights were violated when he suffered physical injury and was deprived of adequate medical care while being held at the Central State Hospital. (Docket No. 2). The matter is before the Court on motion for entry of summary judgment filed jointly by defendants Donnie Glover and Becky Ahlers, R.N. (Docket No. 190) and was referred to the Magistrate Judge pursuant to 28 U.S. C. § 636 (b)(1)(B). (Docket No. 39).

FINDINGS OF FACT

1) Plaintiff Russell Durham was involuntarily committed to Eastem State Hospital on February 14, 1990 when he was found incompetent to stand trial on charges of assault. On March 14, 1990 he was transferred to Central State Hospital.

2) On the evening of August 27, 1990 plaintiff had an altercation with Central State Hospital security officers which gave rise to the present lawsuit. Plaintiff urinated on the floor and became hostile and aggressive when asked to clean up his mess. Precisely what next occurred is a matter of dispute. Plaintiff claims that he was attacked

and beaten by hospital personnel. Defendants claim that plaintiff became violent and they were required to use force to physically subdue him. Regardless of precisely what happened, all parties agree that plaintiff suffered physical injuries as a result of the event—principally a fractured left arm.

3) Both Donnie Glover and Becky Ahlers are employees of Central State Hospital and were on duty the night of August 27, 1990. The basis for the claim of liability against Glover and Ahler is that they were both present or aware that plaintiff was being beaten by other defendants but did nothing to protect him or stop the beating. It is alleged that they had a duty to protect plaintiff and a breach of this duty gives rise to liability under § 1983. (Docket No. 2). Plaintiff has made clear that he is not alleging that these two defendants participated in the beating, were deliberately indifferent to his medical needs, or bear vicarious liability for the actions of other defendants. (Plaintiff's Response to Motion for Summary Judgment of Glover and Ahlers, Docket No. 195, p. 8, n. 5).

4) Also included in plaintiff's complaint is a claim that Glover and Ahlers "conspired to conceal from proper authorities the beating to which the plaintiff had been subjected. " (Docket No. 2). In the pending motion, defendants Glover and Ahlers seek summary judgment on this claim, as well as the other claims against them. In response to the motion for summary judgment, plaintiff has withdrawn the conspiracy claim. (Docket No. 195, p. 8). The plaintiff and several of the defendants have been deposed as follows.

Deposition of Susan Ahlers

5) According to the deposition testimony of defendant Ahlers, she worked the second shift on August 27, 1990 along with Susan Harris, Donnie Glover, Ricky Rhodes, and Mahdee Nu'Man, all of which are or were defendants in this matter. (Ahlers Depo., Part I, p. 55). Plaintiff was in restraints when she came on shift (*Id.* at 56) and about 6:30 p.m. he came to the window at the nurses' station and

made a sexual proposition to her. She didn't hear him ask to go to his room or to go to the bathroom. (*Id.* at 60, 61).

6) Plaintiff then walked toward the activity room and one of the staff told he someone had urinated on the floor. (*Id.* at 63). Nu'Man went to ask plaintiff clean up the urine, as it was the policy to require patients to clean up their mess if it was deliberate. (*Id.* at 65, 66). She remained at the nurses' station. She and Susan Harris then heard a commotion and looked at the television monitor and saw plaintiff kicking at Nu'Man. (*Id.* at 66, 68).

7) She went to the hallway and met a patient running out yelling "Russell's kicking at Mahdee. " (*Id.* at 68). She went to the doorway of the activity room and saw plaintiff fall over a chair. (*Id.* at 70). When plaintiff fell, he hit his head on a table but continued kicking and flailing. He ended up against the wall with Nu'Man at his feet and Rhodes at his head. (Ahlers Depo, Part II, p. 4). Plaintiff was kicking and trying to bite. She thinks Glover had a towel. (*Id.*)

8) Rhodes and Nu'Man carried plaintiff to the seclusion room. (*Id.* at 7). She saw Rhodes pick up plaintiff by his restraint but did not see Rhodes drop or kick plaintiff. (*Id.* at 10). She talked to Rhodes about picking up plaintiff by the restraint belt and Rhodes told her he wouldn't do it again. (*Id.* at 16-17).

The Deposition of Donnie Glover

9) Glover first became aware of the situation when he walked into the activity room from the multipurpose room and saw puddles of liquid on the floor which led to the nurses' station. Nu'Man, Ahlers and Rhodes were standing at the nurses' station discussing the situation. (Glover Depo. p. 61-63). Glover went to plaintiff in the activity room and asked plaintiff to clean up his mess but he refused. (*Id.* at p. 63). After plaintiff had been asked by Glover, Rhodes, Nu'Man, and Ahlers to clean up the floor and he had refused all of them, they decided to put plaintiff in seclusion. (*Id.* at 64-65).

10) While Glover went to the cabinet in the nurses' station to get the restraints, Nu'Man went to ask plaintiff one more time to clean up the floor. (*Id.* at 66-67). Glover heard a commotion and saw Rhodes running into the activity room. Glover followed him into the activity room and saw Nu'Man and plaintiff falling to the floor. As they fell, Nu'Man was holding onto plaintiff's leg. They fell into and over furniture. (*Id.* at 67-68). Up to this point, Ahlers remained at the nurses' station. (*Id.* at 69).

(11) Plaintiff was on the floor kicking and Nu'Man was trying to get hold of his legs. Rhodes was at plaintiff's head trying to get hold of his arms. (*Id.* at 70-71). Plaintiff was "flipping" around on his side and back. After Rhodes got hold of plaintiff's arms, he and Nu'Man lifted plaintiff off the floor and Glover noticed blood on the floor and a cut over plaintiff's eye. Glover then went to the clean linen room to get a towel for plaintiff. (*Id.* at 71-72). Glover did not see Ahlers during the struggle. (*Id.* at 72).

12) Glover didn't see Rhodes or Nu'Man pick plaintiff up by the belt restraint or kick or drop him. As far as Glover could tell, all of plaintiff's injuries were caused by falling on the furniture and wrestling on the floor. (*Id.* at 73-74). Glover did not see Rhodes and Nu'Man carry plaintiff into the seclusion room because he had gone to get a clean towel. By the time Glover got to the seclusion room, plaintiff was already there and restraints were being applied. Ahlers was standing outside the seclusion room. (*Id.* at 74-75).

The Deposition of Plaintiff

13) According to plaintiff, the incident in question began when he asked Becky Ahlers to let him go to his room to lie down and then told her that he needed to go to the bathroom. When permission was denied he "peed in the floor. " (Durham Depo. p. 69, 75-76). Nu'Man told him to clean up the urine from the floor but he refused. Plaintiff then kicked at Nu'Man but did not make contact. Nu'Man then grabbed him and forced him to the floor. (*Id.* at 66).

14) While Nu'Man kicked at plaintiff's face and arm, Rhodes repeatedly picked him up and slammed him into the floor. *(Id.* at 66-67, 109, 123). Plaintiff believed that the Nu'Man and Rhodes were trying to hurt him and noted with amazement that Nu'Man did not even look angry. *(Id.* at 66-67, 109, 116). When asked about defendant Glover's involvement, plaintiff could not remember even seeing him that evening. (*Id.* at 62) At no time during the deposition did plaintiff implicate either Glover or Ahlers in the alleged abuse. He didn't know of any reason for filing suit against these two defendants. (*Id.* at 106-07).

Testimony of Roy Hill

15) Roy Hill is a hospital employee and was present on the evening of August 27, 1990. He stated in his deposition that he observed the incident in question and saw defendants Glover, Rhodes, and Nu'Man with plaintiff. (Hill Depo. pp. 41-43). According to him, defendant Glover was actively involved in the incident and assisted the others in lifting plaintiff. *(Id.* at pp. 41-49). Hill testified that he heard Rhodes say to plaintiff something like "is this what you want?" and then pick him up by his belt and drop him on his head on the floor twice. (*Id.* at pp. 44-46). He also saw Rhodes kneeing or kicking plaintiff. (Id. at 46-47).

16) Hill also testified that even though Ahlers was not in the activity room at the time of the beating, she could see into the room and observed the incident between plaintiff, Nu'Man, Rhodes and Glover. (*Id.* at pp. 41-42).

CONCLUSIONS OF LAW

The Magistrate Judge, having made findings of fact, makes the following conclusions of law.

1) Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." *Canderm Pharmacal, Ltd.* v. *Elder Pharmaceuticals, Inc.*, 862 F. 2d 597, 601 (6th Cir. 1988). Only disputes

over facts that might affect the outcome of the suit under controlling law will preclude the entry of summary judgment. *See Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Factual disputes that are irrelevant or unnecessary will not be counted. *Id. ;Boyd* v. *Ford Motor Co.*, 948 F. 2d 283, 285 (6th Cir. 1991); *Vollrath* v. *Georgia-Pacific Corp.*, 899 F.2d 533, 534-35 (6th Cir.), *cert. den.*, 111 S. Ct. 345 (1990). Not only must the disputed facts be material, the dispute must also be "genuine." In other words, it must involve evidence on which a jury could return a verdict for the nonmoving party. *Anderson*. 477 U.S. at 248.

2) The moving party bears the initial burden to show the district court that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986). The moving party need not support its motion with affidavits "negating" the nonmoving party's claim; nor, does the focus fall on the weight or the truth of the evidence. *Id.; Anderson*, 477 U.S. at 249. The critical question is whether the party bearing the burden of proof has presented a jury question as to each element of its case. *Celotex Corp.*, 477 U.S. at 322; *Stein* v. *National City Bank*, 942 F. 2d 1062, 1064 (6th Cir. 1991).

3) Once the moving party has met its burden of production, the nonmoving party may not rest on its pleadings. *Goins* v. *Clorox* Co., 926 F. 2d 559, 561 (6th Cir. 1991); *Cloverdale Equip. Co.* v. *Simon Aerials, Inc.*, 869 F. 2d 934, 937 (6th Cir. 1989). The nonmoving party must, by deposition, answers to interrogations, and admissions on file, show specific facts that reveal a genuine issue for trial. *Celotex Corp.*, 477 U.S. at 324;*InterRoyal* v. *Sponseller*, 889 F. 2d 108, 111 (6th Cir. 1989). In other words, the nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts. *Matsushita Elec. Industrial Co.*, v. *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). It must submit significant probative evidence in support of its complaint to defeat a motion for summary judgment. Anderson, 477 U.S. at 249-50;

Friedman v. *United* States, 927 F. 2d 259, 262 (6th Cir. 1991). This burden, however, does not arise until the moving party has met its initial burden.

4) In many respects, this standard is similar to the standard applied when considering a motion for a directed verdict. Summary judgment should be granted when the evidence is such that it would require a directed verdict for the moving party. *Anderson*, 477 U.S. at 25 1. If the evidence viewed in the light most favorable to the nonmoving party is so one-sided that one party must prevail as a matter of law, then summary judgment should be granted. *See Morelock* v. *NCR Corp.*, 586 F. 2d 1096, 110405 (6th Cir. 1987) (discussing the directed verdict standard), *cert. den.*, 441 U.S. 906 (1979).

5) In order to establish a right to relief under 42 U.S.C. § 1983, a plaintiff must plead and prove at least two elements: (1) that he has been deprived of a right secured by the constitution and laws of the United States; and, (2) that the defendant(s) deprived him of that right while acting under color of state law. *Parratt* v. *Taylor*, 451 U.S. 527, 535 (1981); *Nishiyama* v. *Dickson County, TN*, 814 F. 2d 277, 279 (6th Cir. 1987) (*en banc.*)

6) In the present case there are several questions of fact regarding what happened on the evening of August 27, 1990. The first question of fact is whether or not excessive force was used against plaintiff. The deposition testimony of plaintiff and Roy Hill indicates there was while the deposition testimony of others indicates that only the force necessary to subdue a physically aggressive patient was used. Assuming that excessive force was used, a second question of fact arises: were defendants Glover and/or Ahlers present at the time or, if not, did they know what was happening? Again, there is testimory supporting both sides of this factual dispute.

7) Even if these factual disputes are resolved in favor of the plaintiff, summary judgment may still be appropriate if it is found as a matter of law that defendants Glover and Ahlers bear no liability for failing to intervene on

plaintiff's behalf. For purposes of the following discussion, it will be assumed that excessive force was used on plaintiff and that defendants Ahlers and Glover were present in the room while plaintiff was being beaten or they were nearby and knew what was happening.

The Duty to Intervene

8) In *Bruner* v. *Dunaway*, 684 F. 2d. 422 (6th Cir. 1982), *cert. den. sub nom., Bates* v. *Bruner*, 459 U.S. 1171 (1983), the Sixth Circuit held that a police officer may bear liability under § 1983 for failure to intervene when other police officers are using excessive force on a plaintiff. This liability applies even if the police officer in question did not "actively participates in striking a plaintiff. " *Id.* at 426. In other words, Bruner stands for the proposition that "a police officer has a duty to try and stop another officer who summarily punishes a person in the first officer's presence. "*McHenry* v. *Chadwick*, 896 F. 2d 184, 188 (6th Cir. 1990) (analysis and interpretation of the Bruner decision). Liability for failure to intervene is imposed equally on supervisory as well as nonsupervisory personnel. *Byrd* v. *Brishke*, 466 F. 2d 6, 11 (7th Cir. 1972) (cited with approval in *Smith* v. *Ross*, 482 F. 2d 33 (6th Cir. 1973)).

9) This form of constitutional tort liability is often expressed by the courts as a breach of a duty. This "duty" has been described as a "duty to enforce the laws and preserve the peace, " *Byrd* at 11; "a statutorily imposed duty to enforce the laws equally and fairly," *Smith* at 36 (cited with approval in *Bruner* at 426); and, "a duty of protection," *McHenry* at 188. This "duty" is attributed to "one who, is given the badge of authority of a police officer... "*Byrd* at 11.

10) *Bruner* was decided in the context of police officers and was based on prior cases decided in the Sixth Circuit and other Circuits involving police officers. Section 1983 liability for failure to intervene was later extended in *McHenry* to include prison officials and guards. No cases have been cited by the present litigants extending this theory of liability beyond the realm of law enforcement in

general or to employees of a state mental hospital in particular.

11) The question presented by the present motion, is whether liability under § 1983 for failure to intervene can or should be extended beyond the field of law enforcement to include state employees like the present defendants. Plaintiff seems to argue that if one group of state employees (law enforcement officers) are subject to this liability, it follows *ipso facto* that all state employees may be held liable for this tort. This sort of argument ignores the basic and fundamental differences between law enforcement officers and other types of state employees. Unlike law enforcement officers, the present defendants have no duty, statutory or otherwise, to enforce the laws or preserve the peace and they carry no "badge of authority." The primary function or duty of the present defendants is to provide mental health treatment or to facilitate the giving of that treatment by others.

12) The Magistrate Judge is reluctant to extend "failure to intervene" liability under § 1983 beyond the realm of law enforcement. The imposition of "failure to intervene" liability on law enforcement personnel is appropriate given their peculiar duties and responsibilities. But, the factors that have led the courts to impose this form of liability on law enforcement personnel do not apply to other types of state employees. Their duties are simply too different. The mere fact that law enforcement personnel are state employees has never been found to be a sufficient reason for this unique theory of liability and is an insufficient reason to extend liability to the present defendants.

13) As the only claim pending against defendants Glover and Ahlers is that they failed to intervene on behalf of plaintiff, and the Magistrate Judge has determined that this form of liability does not extend to these defendants, the questions of fact identified earlier are not *material* issues of fact. There are no genuine issues of material fact and movants are entitled to judgment as a matter of law.

RECOMMENDATION

The Magistrate Judge, having made findings of fact and conclusions of law, recommends that the motion for summary judgment of defendants Donnie Glover and Becky Ahlers be granted and they be dismissed from this action.

/s/ C. Gambill
C. Cleveland Gambill
United States Magistrate Judge

Date: 12-28-94

NOTICE

Within ten (10) days after being served a copy of these proposed Findings and Recommendation, any party who wishes to object must file and serve written objections or further appeal is waived. *Thomas* v. *Arn*, 728 F. 2d 813 (6th Cir. 1984), *aff'd.*, 474 U.S. 140 (1985). 28 U.S. C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b).

CENTRAL STATE HOSPITAL
NURSING DEPARTMENT
JOB DESCRIPTION

Hospital Security Officer (7-3 & 3-11 Shifts)

Position Summary:

Performs non-professional services, non-technical tasks in the direct care of psychiatric patients. Sees that their physical, social and behavioral needs are met in a safe environment. Performs these duties under supervision.

Qualifications:

Education:

A high school diploma or GED equivalency.

Experience:

One year of sub-professional, paraprofessional or professional nursing experience in a psychiatric facility is preferred but not required. Related vocational or technical training is equivalent to experience on a year-to-year basis. Orientation, including classroom and on unit instruction, will be required. Supervision will be given on the unit until necessary skills and knowledge of policies and procedures is obtained.

Aptitudes & Skills:

Command of the English language to read, write and speak. Ability to express ideas clearly and logically. Evidence of good mental and physical health including visual and hearing capabilities; appropriate in grooming, manners, and conduct.

Must have a valid Kentucky Driver's License.

Working Relationship:

Works directly under the supervision of the unit R.N. or the L.P.N. if the R.N. is absent. Indirectly under the unit L.P.N. and Shift Supervisor. Supervise no one.

Working Conditions:

Works in a well-lighted, highly secured, ventilated work area. No heavy physical duties except when

needed to assist in patient management. Occasional health or accident hazards working with patients that are hostile and violent.

Responsibilities:

1. Responsible for Direct Patient Care

   Standards:

   1.a. Assists in activities of daily living, i.e., bathing, gives shampoos, dressing, combing hair, cleaning and trimming nails, oral care, check body functions, supervises meals and other related duties

   b. Assists with treatments and procedures, i.e., Vital Signs, Clinitests-each shift.

   c. Assists with behavioral problem patients who are upset, confused and violent. Assists in restraining and/or secluding them—as needed or requested.

   d. Takes patients to and from therapeutic and social activities and assists with games, taking patients for walks, etc.-as requested.

   e. Assists in admitting new patient to unit, orienting to unit and explaining unit rules -as needed.

   f. Checks on patients in seclusion, restraint or on suicide awareness q. 15 minutes-each shift.

   g. Remains with patients on 1:1-each shift.

2. Transport Patients

   Standards:

   2.a. To transport patients in a safe and least restrictive manner as possible-ongoing

   b. May transport or accompany patient to Humana Hospital University (HHU)/other support services off and on campus-as requested.

3. Demonstrates Leadership Abilities

   Standards:

   3.a. Listens to off-going shift reports and makes appropriate notations-each shift.

   b. properly documents on appropriate authority forms/checklists patient's behavior, all special procedures, responses and daily routines-each shift.

c. Assists in orienting new Hospital Security Officer (HSO's)-as requested.

d. Makes unit rounds checking and the maintenance and safety of the physical area and reports immediately to the nurse any unusual or potential dangers-every 30 minutes and as requested.

e. Assists in maintaining cleanliness of unit (i.e., straightening bathrooms, kitchen, Activity and T.V. Rooms, emptying waste baskets, returning food trays to Dining Room, etc.)-each shift.

f. Responsible for receiving and transporting patient's money and valuables to the appropriate department-as needed.

g. Writes orders for Canteen purchases-as requested by nurse or social worker.

h. Searches newly admitted patients, their luggage, bags, etc.-as needed.

4. Demonstrates Skills in Interpersonal Relationships
Standards:

4.a. Establishes a rapport with the patients-ongoing.

b. Establishes functional rapport with peers and supervisory personnel-ongoing.

c. Assists in the formulation and implementation of the patients treatment plan-ongoing.

d. Provides feedback regarding patient's participation in Treatment Plans to Treatment Team and Supervisor-ongoing.

e. Observes patient's behavior and reports immediately any change to the nurse in charge-ongoing.

f. Maintains patient's and staff's confidentiality-ongoing.

5. Demonstrates Cooperation

Standards:

5.a. Searches for AWOL's, assists with unit emergencies, i.e., Code One's, Blue Flash, Manpowers and other emergencies-as needed.

b. Responsible for compliance of hospital policies and procedures-ongoing.

c. Distributes supplies used for patient care efficienty-ongoing.

d. Attends unit meetings, inservices-as scheduled.

e. Performs other duties of a non-professional nature as assigned by nurse in charge or supervisor-as required.

I HAVE READ THE JOB DESCRIPTION AND FULLY UNDERSTAND THE REQUIREMENTS SET FORTH. I ACCEPT THE POSITION HOSPITAL SECURITY OFFICER AND AGREE TO ABIDE BY THE REQUIREMENTS SET FORTH AND WILL PERFORM ALL DUTIES AND RESPONSIBILITIES TO THE BEST OF MY ABILITY.

Date: 2-5-90

/s/ [Illegible]
Employee's Signature

Date: 2-7-90

/s/ L. Evelyn Norris, R.N.
Supervisor's Signature